U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 August 2003

CASE NO.: 2002-LHC-2076

OWCP NO.: 18-75439

In the Matter of:

KRSTO JELENIC,
Claimant,

vs.

SAN PEDRO BOAT WORKS,
Employer,

and

FRANK GATES ACCLAIM, INC.,
Carrier.

Appearances:

Robert W. Nizich, Esq.
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For the Claimant

Alexa A. Socha, Esq.
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For the Employer/Carrier

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

INTRODUCTION

This matter involves a claim for disability benefits filed by the Claimant, Krsto Jelinic, under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901 et seq. ("the Act"), for an injury he suffered on December 12, 2000, while working at San Pedro Boat Works. This proceeding was initiated under the Act on June 7, 2002, when it was referred to the Office of Administrative Law Judges for formal hearing.

For the reasons set forth below, the Claimant is awarded permanent, total disability benefits.

PROCEDURAL BACKGROUND

This matter was heard in Long Beach, California, on December 10 and 11, 2002. The Claimant, his counsel, Robert Nizich, and the Employer and Carrier's counsel, Alexa Socha, all appeared and participated in the trial on both days. The direct testimonies of Paul Johnson and Amy Koellner were offered in writing at the trial, and they appeared in person for cross-examination.

At the trial, the Claimant's Exhibits ("CX") 1-19 were admitted, and the Employer's Exhibits ("EX") 1-12 and 14-28 were admitted. The Employer's Exhibit 13 was excluded. Admission of the Employer's Exhibit 29 was not addressed during the hearing. I informed the parties of this oversight in an order issued July 2, 2003, and gave them until July 24, 2003, to object to the admission of Employer's Exhibit 29. Both parties indicated they had no objection to the admission of Employer's Exhibit 29. Employer's Exhibit EX 29 is hereby admitted into evidence.

On December 18, 2002, the parties took the post-trial videotaped deposition of John Rados Wall, who was not available to testify at the time of the trial. Mr. Wall's videotaped deposition, along with a transcript of the deposition, was submitted to me on January 7, 2003, and is admitted into this record as EX 30.

ANALYSIS AND DISCUSSION

Issues

The following issues are pending before me in this case:

1. Was the Claimant's light-duty employment with the Employer a sheltered-employment situation?

2. Was there suitable alternate employment available for the Claimant after he became permanently disabled?

3. What is the extent of the Claimant's permanent disability?

4. Is the Employer entitled to Section 8(f) relief?

Though initially disputed, the parties reached agreement as to the Claimant's average weekly wage before filing their post-trial brief. There is no dispute as to the Claimant's entitlement to temporary total disability benefits.[1] There was also initially a dispute as to whether the Claimant

[1] Based on the parties' stipulated average weekly wage, the Claimant will be entitled to some additional temporary total disability benefits.

received an overpayment of temporary total disability benefits, but that issue was resolved by the parties' agreement as to the Claimant's average weekly wage.

Factual Background

The Claimant, who was born on March 19, 1941, in Croatia received a sixth grade education in Croatia before immigrating to the United States. While in Croatia, he served 21 months in the army and attended a trade school for 5 years. (HT, p. 12.) He could not speak or read English when he arrived in the United States. Though the Claimant can now speak English, his ability to read and write English is limited. (HT, p. 14.) He attended English classes for only one and one-half months after arriving in the United States. (HT, p. 32.)

The Claimant has worked in a shipyard and as a chief engineer on a fishing boat and obtained his chief engineer's license after passing an oral examination administered by the Coast Guard. The Claimant started working for San Pedro Boat Works in 1982 as a marine machinist and was promoted to working foreman machinist in 1989. As a working foreman, the Claimant worked along side the machinists he supervised. He gave guidance to other workers, demonstrated tasks, and inspected the work that was completed. He used heavy tools and regularly lifted over 35 pounds. He sometimes lifted 100, 120 or 150 pounds. He climbed ladders and pushed and pulled heavy objects on a regular basis. (HT, pp. 17-8.) The Claimant had a pre-injury average weekly wage of $1,018.13.[2]

On December 12, 2000, the Claimant was working on a Coast Guard ship in San Diego, California. His job was to align the main engine of the ship with the propulsion shaft. As he was tightening the foundation bolts on the engine, the ship, which was in the water at the time, shifted slightly, causing him to lose his balance and injure his shoulder. (HT, pp. 19-20.) He mentioned his injury to his co-workers as they drove home from San Diego on December 12, 2000. He also mentioned the injury to Don Thomas, a supervisor for the Employer, but he did not seek medical treatment until his hand started bothering him about a month and a half after the accident. (HT, pp. 20-21.) He reported the injury to the Employer and asked for authorization for medical treatment after his hand started bothering him. The Employer prepared a written report of the injury on March 13, 2001. (EX 3.)

The Claimant was examined by Dr. James London on March 14, 2001. He reported to Dr. London that he experienced intermittent pain in his right shoulder when he reached forward or attempted to reach over his head. He also reported that the pain was aggravated by lifting, pushing or pulling with his right upper extremity and that he experienced stiffness, tenderness and weakness in his right shoulder. (EX 6, p. 43.) Dr. London reported to the Employer's insurer that the Claimant sustained a "straining injury" to his right shoulder as a result of an accident at work on December 12, 2000. (CX 1.) Dr. London recommended that the Claimant undergo an MRI of his right shoulder to rule out a possible rotator cuff tear but indicated that the Claimant was capable to continuing with

[2] The parties reached agreement on the Claimant's pre-injury average weekly wage after the trial concluded and referenced their agreement in their closing briefs.

his work. (EX 6, p. 45.) The Claimant underwent an MRI on March 19, 2001. (CX 2.) After reviewing the results of the MRI, Dr. London recommended that the Claimant undergo right shoulder surgery for arthroscopy, acromionplasty and rotator cuff repair. (EX 8, p. 53.)

Though Dr. London indicated that the Claimant would be totally disabled for at least three months after the surgery and would require physical therapy, he also indicated that the Claimant could continue to work before the surgery. (CX 3, p. 6; EX 6, p 41-42.) Dr. London operated on the Claimant's right shoulder on May 1, 2001. (CX 4, p. 7; EX 6, p. 39, EX 9, p. 54.) After the surgery, the Claimant underwent physical therapy and regular examinations by Dr. London. He remained temporarily totally disabled until January 2002. Dr. London examined the Claimant on January 9, 2002, and reported on January 14, 2002, that the Claimant was permanent and stationary but was unable to return to his prior type of work. (EX 6, p. 20.) On January 14, 2002, Dr. London restricted the Claimant permanently from work that involved lifting or carrying loads over 35 pounds, overhead lifting, and ladder climbing. (CX 5, p. 11; EX 6, p. 20.)

In early February 2002, the Claimant was instructed to return to work and did so on February 6, 2002. The Claimant was put on light duty but was not assigned to a job with a formal job title. He was supervised by John Wall, the yard superintendent. (Deposition of John Wall, EX 30, p. 11.) In his light duty assignment, he provided advice and instruction to other workers about how to maintain or repair a ship. On occasion, he would help to clean the work area, or he would perform other minor tasks, sometimes, using small tools. He would also just spend time in the shop, on the boat, or on the dock without performing any tasks. (HT, pp. 25-26, 66.) On one occasion, the Claimant helped drill some holes in some half-inch thick sheets of zinc, and on another occasion, he provided hand signs to a crane operator who was lifting materials from the dry dock. (HT, pp. 70, 72.) The Claimant did not supervise any boat repairs and did not do any lifting over 35 pounds. He did not climb any ladders or do any repeated overhead lifting. (HT, pp. 65-66.) He spent between 10% and 25% of his time providing advice to the other workers. (HT, p. 26; EX 30, p. 44.) The Claimant had no other duties during the rest of his work hours and was sometimes sent home early or asked not to report for work due to lack of work. (HT, p. 27; EX 30, pp. 28, 41) During this time, he was paid his pre-injury hourly rate of $21 per hour. (HT, p. 25; EX 30, p. 34.)

In May 2002, the U.S. Department of Labor Office of Workers' Compensation Programs asked Amy Koellner, a vocational rehabilitation expert, to perform a job analysis on the Claimant's light duty position. She met with the Claimant and Mr. Wall on June 13, 2002, to discuss the Claimant's job duties and the physical demands of his job. On July 29, 2002, Mr. Wall wrote Ms. Koellner and described the Claimant's job title as being "foreman" and indicated that it was a permanent position. (EX 12, p. 93.) After completing her interviews, Ms. Koellner prepared a Job Analysis, EX 12, pp. 94-98, which she sent to Dr. London on August 1, 2002, with an inquiry as to whether this job fell within the Claimant's medical restrictions. (EX 12, p. 92.) On August 14, 2002, Dr. London informed Ms. Koellner that the job was within the Claimant's medical restrictions. (EX 6.)

The Claimant continued in his job until October 15, 2002, when he was laid off. (HT, p. 26.) San Pedro Boat Works closed down approximately a week after the Claimant was laid off. (HT, p. 30.)

Dr. Allan Delman examined the Claimant on behalf of the Employer on September 10, 2002, and agreed with Dr. London's conclusion that the Claimant became permanent and stationary on January 9, 2002. He also agreed with the limitations that Dr. London put on the Claimant's physical activity. (EX 7, p. 51.) Dr. Delman diagnosed the Claimant as suffering from a rotator cuff tear in his right shoulder with impingement syndrome. Dr. Delman also agreed that the Claimant should be restricted from lifting and carrying over 35 pounds, forceful pushing and pulling on loads over 35 pounds and repetitive overhead work or lifting and ladder climbing. He expressed the opinion that the Claimant could continue working in his light duty position at San Pedro Boat Works. (EX 7.)

After being laid off on October 15, 2002, the Claimant did not seek other employment until towards the end of November 2002, when the Claimant went to Universal Protection Services ("UPS") in Santa Ana to look for work. Though he spoke to the receptionist at UPS, he did not complete an application. (HT, pp. 43-44.) He returned to UPS on December 9, 2002, at the suggestion of his counsel and completed an application, EX 29. He was interviewed at that time by Ed Guzman, the Operations Manager at UPS. (HT, p. 50.)

Benefits the Claimant Received

The Claimant received $24,419.92 in temporary total disability benefits from May 1, 2001, to January 9, 2002, at a rate of $672.99 per week. (EX 4, p. 4.) He was paid permanent total disability benefits totaling $3,221.04 from January 10, 2002, to February 9, 2002. (EX 4, p. 4; EX 27.) From February 10, 2002 to November 30, 2002, he received permanent partial-disability benefits totaling $8,253.94. (EX 27.)

All the benefits paid before trial were based on an average weekly wage of $1,009.97. After the trial was concluded, the parties stipulated that his average weekly wage was $1,018.13, and that he should have received weekly compensation in the amount of $678.75 for his total disability.

The Claimant Is Permanent Disability

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168 (2d Cir. 1990); *Sinclair Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if the claimant is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982); *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

At the time of the trial, the Claimant testified that though he has occasional pain and numbness, he was not taking a pain medication and that he had received no physical therapy for his shoulder during the year preceding the trial. (HT, p. 37.) Dr. London reported that the Claimant's condition became permanent and stationary on January 9, 2002. Dr. Delman concurred in Dr. London's opinion that the Claimant became permanent and stationary on January 9, 2002. Both Dr. London and Dr. Delman diagnosed the Claimant as suffering from a rotator cuff tear in his right shoulder. Both doctors also placed him on restrictions that precluded him from lifting and carrying over 35 pounds, forceful pushing and pulling on loads over 35 pounds and repetitive overhead work or lifting and ladder climbing.

Thus, the Claimant retains a residual disability after reaching maximum medical improvement and is permanently disabled. The remaining issue is the extent of his permanent disability, whether it is total, as the Claimant claims, or whether it is only a partial disability.

The Claimant's Sheltered Employment Claim

The definition of "disability" under the Act includes a "wage-earning aspect" which plays an important role in determining whether the disability is total or partial. A claimant's disability becomes total if there is no "suitable alternative employment" available to the claimant which enables the claimant to earn the same wages the claimant earned before the injury. *Stevens v. Director of Workers' Compensation Programs*, 909 F.2d 1256, 1259 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

In order to establish a *prima facie* case of total disability, a claimant need only establish that he is unable to return to his former employment because of a work-related injury or occupational disease. Once he does so, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which the claimant is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Manigault v. Stevens Shipping Company*, 22 BRBS 332, 333 (1989).

It is undisputed that the Claimant cannot return to his former position as a working foreman because of his physical restrictions. However, despite the physical restrictions, the Claimant returned to work at San Pedro Boat Works on February 6, 2002, at his former rate of pay. The fact the Claimant worked after his surgery does not necessarily preclude a finding of total disability. *Walker v. Pacific Architects & Engineers, supra*, 1 BRBS 145, 148 (1974); *Offshore Food Serv. v. Murillo*, 1 BRBS 9, 14 (1974). An award of compensation concurrent with continued employment traditionally has been limited to two situations. The first is the "beneficent employer" or "sheltered employment" situation where the claimant's post-injury employment is due solely to the beneficence of his or her employer. *See Walker v. Pacific Architects & Engineers; Proffitt v. E.J. Bartells Co.*, 10 BRBS 435 (1979). The other situation is where the claimant continues his or her employment through "extraordinary effort," and in spite of excruciating pain and diminished strength. *See Jordan*

v. Bethlehem Steel Corp., 19 BRBS 82 (1986). *See also Richardson v. Safeway Stores*, 14 BRBS 855, 857-58 (1982).

The Claimant alleges that his employment at San Pedro Boat Works after February 6, 2002, was a sheltered employment situation and that he should be found to be permanently totally disabled. He claims that no job really existed when he was asked to return to work in February and that he actually performed very little work, though he was paid his full pre-injury hourly rate for being at work. He estimated that he only worked about 10% of the time and claimed that he was sometimes asked to go home early or to help sweep up because of lack of work. (HT, pp. 27, 75.)

Light duty work, such as that performed by the Claimant, is not sheltered employment if the employee is capable of performing it, it is necessary to the employer's operations, it is profitable to the employer, and several shifts perform the same work. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

After reviewing all the evidence, I find that the Claimant's light-duty assignment at San Pedro Boat Works was sheltered employment. When the Claimant was asked to return to work in February 2002, he was not assigned to a job that had a formal job title. John Wall testified that the Claimant was returned to work "to keep him there for his knowledge of the business." (EX 30, p. 11.) The Claimant's only duty was to give advice. (EX 30, p. 29.) Though Mr. Wall and the Claimant disagreed as to whether the Claimant's "advice" duties took 10% or 25% of his time, the fact remains that those were his only duties, and they took up only a fraction of his work day. The Claimant did not supervise any boat repairs and did not perform any strenuous work. The Claimant occasionally helped clean the area by sweeping to fill his time, but even Mr. Wall acknowledged that at $21 per hour, it was cheaper for the laborers on the payroll to perform that task. (EX 30, p. 42.)

The Employer argues that the Claimant's advice to workers was needed because two superintendents with knowledge of the boat repair industry had left. In 2002, the Employer was down to 3 machinists. (EX 30, p. 13.) While the Claimant had numerous years of experience in the boat repair industry, Mr. Wall, himself, had 15 years of work experience with San Pedro Boat Works and was functioning as the yard superintendent. (EX 30, p. 7.) Mr. Wall, was available for advice, and his father, Andy Wall, who had 40 years of experience in ship repair, was present every day and also available as a resource to these employees. (EX 30, pp. 28, 48.) San Pedro Boat Works was laying off employees in 2002 due to lack of work. It did not have a steady flow of projects in 2002, and Mr. Wall acknowledged the work level could be characterized as being "slow." There were periods when the company went without any projects, and workers were sometimes sent home early due to lack of work. (EX 30, p. 16.) The payroll records, EX 24, show that the Claimant seldom worked a full 40-hour week while on light duty.

Employer also asserts that the value of the Claimant's light duty was job was corroborated by Amy Koellner, a neutral vocational expert, because she concluded that the Claimant was performing necessary, beneficial services for San Pedro Boat Works. Ms. Koellner was asked by the U.S. Department of Labor to perform a job analysis of the Claimant's light duty position at San Pedro Boat Works. To carry out her assignment, she interviewed the Claimant and Mr. Wall and prepared

a job analysis which she sent to Dr. London, asking him if the position satisfied the Claimant's physical restrictions. (EX 12.)

Ms. Koellner was not asked to do an economic analysis of whether the Claimant's job was profitable to the Employer. (HT, pp. 137, 139.) Her role was merely to identify the duties that were performed to see if they fell within the Claimant's physical limitations. At the trial, she did express the opinion that the Claimant's light duty job was a "realistic" one, and she defined a "realistic" job as one "of value to the employer, a defined position that has a job title, that has job duties, that has physical demands, that is of value to an employer is willing to pay a salary for that person to perform the job duties." (HT, p. 160.) However, she admitted that her opinion was based on Mr. Wall's comments to her about the value of the Claimant's work, the fact that the Claimant was kept on the payroll, and the fact that his salary continued to be paid. (HT, p. 161.) She also said it would be "strange" for an employer to continue to keep an employee employed if he was not performing necessary duties. (HT, p. 160.) Ms. Koellner conducted no independent review of the Employer's financial and payroll records as part of her job analysis, and her opinion as to the "realistic" nature of the Claimant's light duty job was not based on any type of financial or payroll audit of the Employer's records. (HT, p. 149.) Her assessment of the "value" of the Claimant's job was based on Mr. Wall's statement to her and her belief that an employer would not keep an unprofitable employee on the payroll. Thus, I give no weight to her assessment of the value of the Claimant's light duty position to the Employer.

After reviewing the evidence and testimony, I find that the Claimant's position was not necessary to San Pedro Boat Works, nor was it profitable to San Pedro Boat Works for the Claimant to hold a position at $21 per hour that kept him busy 10 to 25% of the time with the responsibility of providing advice that could have been provided by John or Andy Wall. San Pedro Boat Works was in financial difficulties, as evidenced by the lay-off of workers, the fact that the Claimant and other workers were sometimes sent home early and the acknowledged fact that there were periods when there were "no projects" to be worked on. Thus, I conclude that the Claimant's light duty position was "sheltered employment." *See Peele v. Newport News Shipbuilding & Dry Dock Co., supra*; *Walker v. Sun Shipbuilding & Dry Dock Co., supra*.

Criteria for Suitable Alternate Employment

Though the Claimant's light duty position was sheltered employment, he is still not totally disabled if the Employer can show that there was suitable alternate employment available to the Claimant that he was capable of performing. In order to meet this burden, the Employer must show the availability of job opportunities within the geographical area in which the claimant was injured or in which claimant resides, which he can perform, given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327 (9th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988); *New Orleans Stevedores v. Turner*, 661 F.2d at 1042-43; *Mijangos v. Avondale Shipyard, Inc.*, 19 BRBS 15 (1986).

To satisfy its burden of showing the availability of suitable alternative employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee*, *supra*, at 1330. In considering whether a claimant has the ability to perform particular work, the claimant's technical and verbal skills, as well as the likelihood that a person of the claimant's age, education, and background would be hired if he diligently sought the possible job identified by the employer are considered. *Hairston*, *supra*, at 1196; *Stevens v. Director, Office of Workers Compensation Programs*, 909 F.2d at 1258. If an employer makes the requisite showing of suitable alternative employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he or she diligently tried to obtain such work, but was unsuccessful. *Edwards v. Director, Office of Workers' Compensation Programs*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, Office of Workers' Compensation Programs*, 937 F.2d 70 (2nd Cir. 1991).

Alternate Employment Identified for the Claimant

In this case, the Claimant is 61 years old and has a 6th grade education from Croatia. He attended a trade school in Croatia but did not speak or read English when he arrived in the United States in 1969. After arriving in the United States, the Claimant attended English classes for only 1 ½ months. (HT, p. 32.) He has worked as a marine machinist, fisherman, chief engineer, marine mechanic and supervisory marine machinist. Though he took and passed the Coast Guard test to get his Chief Engineer's license, he took the test orally.

The Employer argues that there was suitable alternate employment available to the Claimant as of October 15, 2002, when he was laid off from San Pedro Boat Works, and also from the date he reached maximum medical improvement. Paul Johnson, a vocational consultant, was retained by the Employer to evaluate suitable alternate employment for the Claimant. Mr. Johnson met with the Claimant on May 20, 2002, and gave him a reading test. The Claimant was able to read portions of the paragraph accurately, but he was unable to do so with speed and fluidity. (HT, p. 83.)

After assessing the Claimant's capabilities, experience, and physical restrictions and conducting a labor market survey, Mr. Johnson concluded that there was only one occupation that satisfied the Claimant's needs. That was the position of an unarmed lobby ambassador. (HT, p. 88.) In a November 6, 2002, Labor Market Survey, Mr. Johnson listed lobby ambassador positions as being available on 11 different dates:

January 13, 2002
February 18, 2002
March 18, 2002
April 7, 2002
May 13, 2002
June 23, 2002
July 14, 2002
August 11, 2002

September 26, 2002 (listed 13 times)
October 26, 2002
November 5, 2002

These jobs were all with Universal Protection Services ("UPS"), a company that provides security guards and lobby ambassadors to businesses in Southern California. Universal Protection Services has offices throughout Southern California. The listings included in Mr. Johnson's report were generated from the UPS office which is based in Santa Ana. The actual positions were scattered throughout Orange County. (HT, p. 208-9.)

Mr. Johnson identified the actual job assignments as being located as follows:

January 13, 2002	(no location given)
February 18, 2002	(no location given)
March 18, 2002	(no location given)
April 7, 2002	Santa Ana
May 13, 2002	Santa Ana
June 23, 2002	City of Orange
July 14, 2002	Brea
August 11, 2002	Anaheim
September 26, 2002	Tustin, Fullerton, Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Garden Grove, Huntington Beach, Irvine, Orange, Santa Ana
October 28, 2002	Santa Ana
November 5, 2002	Garden Grove

The Claimant went to UPS in November 2002, but did not submit an application after reviewing the "Conditions of Employment" for working at UPS. (CX 15.) However, at the suggestion of his counsel, he returned and submitted an application for employment at UPS on December 9, 2002. As part of the application process, he was screen by the receptionist. He told the receptionist that he wanted to get work within 20 miles of the harbor and that he was interested in full-time day work. Edward Guzman, the Operations Manager for UPS, interviewed the Claimant on December 9, 2002. Mr. Guzman had no full-time day-shift positions available at the time the Claimant applied. (HT, p. 252.)

Mr. Johnson's Labor Market Survey Was Deficient

The Proper Geographic Area

There are several problems with Mr. Johnson's labor market survey. Suitable alternative employment must be within the geographic area where the claimant lives. Mr. Johnson failed to identify a geographic location for the positions listed for January, February and March 2002. These positions were advertised by the Santa Ana branch of UPS, which includes positions throughout

Orange County, California. (HT, p. 208.) No evidence was introduced at trial as to whether the January, February and March positions were within the geographic area where the Claimant lived. Robert Jones, the HR Coordinator for UPS testified that UPS would not offer the Claimant a job in Santa Ana because they assign their employees to jobs within a 20 mile radius of the employee's home, and Santa Ana is outside that range for the Claimant. (HT, p. 296.) Mr. Johnson, himself, testified that a "reasonable geographic location" for suitable alternate employment is any location that can be reached in an hour. (HT, p. 85.) The Employer offered no evidence as to whether any of these positions were at locations that could be reached in an hour or were within 20 miles of the Claimant's residence.

The Claimant's Physical Limitations

The general conditions of employment for employment with UPS are listed on a sheet that is handed to all potential applicants. Those conditions of employment require the applicants to, either with or without accommodation, be able to stand or walk for an entire shift, climb stairs or ladders, lift or carry up to 50 pounds, run and engage in self-defense. (CX 1; HT, p. 209.) With physical activity restrictions that prohibit the Claimant from lifting or carrying more than 35 pounds and ladder climbing, the Claimant clearly cannot accept any UPS position available unless the specific assignment was within his physical limitations or the physical requirements of the job could be accommodated to fit his limitations. Not all the lobby ambassador positions required all the listed physical capabilities, and UPS employed security guards and lobby ambassadors with disabilities and limitations. The actual physical requirements depend on the job specific assignment. However, there is no evidence that any of the positions Mr. Johnson identified were ones that either fell within the Claimant's physical limitations or could be modified to accommodate his limitations.

The Claimant's Limited English

Another problem is the Claimant's limited command of English, which Mr. Johnson downplayed. Though the Claimant speaks English, he has obvious difficulty speaking and understanding English. During his oral interview at UPS, he was asked "What three words best describe you?" Mr. Guzman, who asked the Claimant these questions, testified that the Claimant did not understand the question initially, and he had to explain to the Claimant what information he was looking for before the Claimant was able to answer the question. (HT, p. 222.) The Claimant testified in broken English with a very heavy accent, which sometimes made his answers difficult to understand. The difficulty in understanding his spoken English is evidenced by the fact that the receptionist who did the preliminary screening thought he said he wanted to work near La Habra, when he said he wanted to work near "the harbor." (HT, p. 219; EX 29.) During his interview of the Claimant, Mr. Johnson administered a reading test to the Claimant by asking the Claimant to read one paragraph. Mr. Johnson testified that the Claimant was able to read the words accurately, but he was unable to do it with speed and fluidity.

Mr. Johnson did not test the Claimant's writing ability. (HT, p. 83.) Mr. Guzman testified that he thought the Claimant's writing skills were "fair" based on the Claimant's application. (HT, p. 228.) The Claimant's job application does not support Mr. Guzman's assessment that the

Claimant's writing skills were "fair." The Claimant failed to properly fill out every part of the application that required any type of written answer other than very basic information such as his name, address, phone number and social security number. When identifying his past employment in his application, the Claimant wrote that his past job was "maren mechanic," and he described his duties as "reper boat." (EX 29.) In the Education/Military Information section of the application, the Claimant wrote "yes" in the box that asked for the name and address of his elementary school. In the same part of the application where he was asked to identify the highest grade completed and/or degree, he wrote "chef engener nor feshinp." (EX 29.) In his application, he was asked to take 10 minutes to write what he had observed in the waiting room, and he merely wrote "Evret ir O.K." (EX 29.) The Claimant testified that he did very little writing at San Pedro Boat Works, and he often had to be asked about what little he did write. (HT, p. 32.)

Mr. Johnson asserts that the Claimant can work as a lobby ambassador. However, the Claimant cannot work at every lobby ambassador position because certain assignments could exceed his physical limitations or cannot be modified to accommodate his physical limitations. Mr. Guzman testified that security positions require the ability to "observe and report." (HT, p. 213.) Mr. Guzman also testified that being able to write in English is an essential part of the lobby ambassador/security guard position. (HT, p. 214.) UPS's job application specifically says that "[r]eport writing is a critical part of a security officer's duties." (EX 28.) The Claimant's limited ability to write English is a significant hindrance to his ability to write reports. As discussed earlier, the Claimant has obvious difficulty writing, and even understanding, English. Though the Employer argues that the Claimant's past job required him to prepare written reports in the past, the Claimant's own testimony was that he wrote very few reports, and he was often asked to explain what he did write. The Employer argues that the Claimant's limited ability in writing English could be accommodated, pointing out that Mr. Guzman testified that his company had accommodated an employee who was unable to write by allowing that employee's wife to write the reports after the employee completed his shift. This argument ignores the fact that Mr. Guzman, on cross-examination, specifically said he was not going to this accommodation to the Claimant because that arrangement had to be authorized by the client and that accommodation was made in a situation where the client liked the UPS employee and had specifically agreed to it. (HT, pp. 201, 214.)

The record is unclear as to how well a lobby ambassador must be able to write English. Robert Jones, the HR coordinator at UPS, testified that their employees need to be able to read English and have a high school graduate level of writing, though he acknowledged that there were employees who only had a 10th or 11th grade education. However, he was not aware of anyone working for UPS who had only an elementary or junior high school reading level of education. (HT, p. 268-9.) Mr. Guzman, however, testified that there are positions that require minimal report writing and that field managers review reports before they're given to the clients and will correct spelling errors. (HT, p. 286.) The Claimant's difficulties filling out his job application make it clear that he would be unable to work at an assignment that required any more than minimal report writing and would be limited to those assignments that involve minimal report writing.

The Employer Failed to Identify Suitable Alternate Employment Before December 9, 2002

The Ninth Circuit has held that to satisfy its burden of showing suitable alternative employment, an employer must point to specific jobs that the claimant can perform. *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327, 1330 (9th Cir. 1980). In *Bumble Bee*, the Ninth Circuit specifically held that showing that a claimant can perform general "sedentary" work was insufficient to satisfy this burden. In 1990, the Ninth Circuit went further and said that total permanent disability becomes partial permanent disability only as of the date that an employer shows that there was suitable alternative employment available. *Stevens v. Director, Office of Workers' Compensation Programs*, 909 F.2d at 1259. In *Stevens*, the Ninth Circuit rejected an argument that the Claimant should be found partially disabled as of the date he reached maximum medical improvement because even though an alternate position was identified, there was no evidence that alternate position was actually available on the date the claimant reached maximum medical improvement.

The BRB narrowed the scope of the Ninth Circuit's decision in *Bumble Bee* in *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). In this recent decision, the BRB said that Ninth Circuit's standard in *Bumble Bee* (requiring that the precise nature, terms, and actual availability of suitable alternate jobs must be shown), is met by a showing of one specific available job opportunity, accompanied by more general evidence of the availability of similar positions. *Berezin, supra*, at 166. The Employer argues that under *Berezin*, it does not have to identify specific suitable alternate jobs for the Claimant, as long as it has identified one suitable position that is available.

Berezin is easily distinguishable from the facts of this case. In *Berezin*, the employer identified a specific position, machinist trainee, that the claimant could perform, and the employer's and claimant's vocational experts both agreed that the position was generally available to the claimant starting the day after he was released to work. Berezin, supra, at 166. We do not have a similar factual situation in this case. As discussed earlier, the Claimant could not perform the duties of every lobby ambassador position available because of his physical and language limitations, and there was no agreement, or evidence, that the jobs with the duties that the Claimant could perform were generally available. The claimant in *Berezin* was able to work in any machinist trainee position. This is not true in this case, where the Claimant can only work in certain lobby ambassador positions.

After weighing all these considerations, I find that the Employer has failed to show that there was suitable alternate employment available for the Claimant before December 9, 2002. While the Claimant may be able to work in some of the lobby ambassador assignments available to UPS, it was the Employer's burden to identify the specific jobs and when they became available. *See Bumble Bee, supra*, at 1330; *Stevens, supra*, at 1260. The Employer has failed to meet this burden.

There was no showing that the jobs in January, February, and March 2002, were within the Claimant's geographic area. Mr. Johnson's report failed to identify the location of those jobs. The jobs that Mr. Johnson listed for April, May, October 2002, and at least one of the jobs in September 2002, would not have been offered to the Claimant because they were in Santa Ana, which was beyond the 20-mile radius of the Claimant's home, and UPS has a policy of not making assignments

more than 20 miles from an employee's home. *See Hairston* at 1196. With respect to the remaining jobs, the Claimant's physical limitations and limited command of English limit the actual assignments he can take. The suitable alternate positions must be within the Claimant's physical limitations, or they must be such that his limitations can be accommodated, and they cannot require any lengthy report writing in English. The Employer has failed to identify which of the remaining jobs would satisfy these criteria.

Thus, I find the Employer has failed to show that there was suitable alternative employment available to the Claimant before December 9, 2002.

The Job Allegedly Offered December 9, 2002, Was Not Suitable Alternate Employment

The Claimant applied for a job with UPS on December 9, 2002, and was interviewed by Mr. Guzman. The Employer argues that UPS made a job offer to the Claimant during the interview which should be considered suitable alternative employment for the Claimant. There is a dispute as to whether or not Mr. Guzman offered the Claimant a position at the end of the interview. Mr. Guzman testified that he offered the Claimant a job in Costa Mesa working as a security guard at a rate of $8.00 per hour for two days a week on the graveyard shift from 11:00 p.m. to 7:00 a.m.. The position involved patrolling the Harbor Center and driving a golf cart from 80 minutes a day to during the entire shift. (HT, pp. 239-241.) The Claimant denies that Mr. Guzman offered, or even discussed, such a position with him during his interview. (HT, p. 301.)

There is no need to resolve this factual dispute. The position offered to the Claimant, that of security guard, patrolling some type of a building complex using a golf cart, was not the type of position Mr. Johnson identified as being the only suitable alternate position the Claimant could occupy. To correct this discrepancy between his labor market survey and the alleged job offer, Mr. Johnson testified that unarmed lobby ambassador and unarmed security guard positions are the same and that the only difference is the uniform that is worn. (HT, p. 93.)

I am not persuaded that the positions are the same, and Mr. Johnson's own reports are inconsistent with his testimony. Though he testified that these positions are the same, he did not identify "unarmed security guard" as a position that the Claimant could work at. (EX 11, p. 70.) Presumably, since Mr. Johnson is a vocational consultant, if the positions were exactly the same, he would have listed "unarmed security guard" in his report and would have testified that there were two occupations the Claimant could perform. He did not. However, he has identified both jobs where he thought it appropriate. He prepared a labor market survey for Manuel Vasquez, another San Pedro Boat Works injured worker, and identified both occupations as being appropriate for Mr. Vasquez. (CX 16.)

The Claimant was available for work during the same time that Mr. Vasquez was available, and Mr. Vasquez actually accompanied the Claimant to UPS on both occasions. Mr. Johnson not only identified the unarmed security guard occupation as one that Mr. Vasquez could perform, he actually listed unarmed security guard vacancies in the labor market survey he prepared on October

29, 2002, for Mr. Vasquez, a week before he prepared a similar report[3] for the Claimant. These unarmed security guard vacancies were available February 10, 2002, March 17, 2002, and May 12, 2002. The Claimant was available for work within his physical imitations on those dates. These jobs were not included in the Claimant's labor market survey, even though Mr. Johnson obviously used information compiled for Mr. Vasquez's labor market survey in preparing the Claimant's. In fact, 18 of the specific job vacancies Mr. Johnson listed in the Claimant's labor market survey were included in the labor market survey he prepared for Mr. Vasquez.

Since the Employer's own vocational consultant identified "lobby ambassador" as being the only occupation the Claimant could occupy and did not include "unarmed security guard" as a possible suitable alternate position despite opportunities to do so when he prepared his labor market survey for the Claimant, I find the offer of the part-time security guard position in Costa Mesa was not a valid offer of suitable alternate employment. Thus, I find the Employer has failed to establish that a suitable alternative position was offered to the Claimant on December 9, 2002.

The Claimant Attempted to Find Alternate Employment

The Employer argues that the Claimant failed to make a diligent search for employment. In support of their argument, they point out that the Claimant went to UPS on one occasion and left without filling out an application, and that the Claimant rejected a job that was offered to him by Mr. Guzman. As discussed above, I find that the security guard job allegedly offered by Mr. Guzman was not suitable alternate employment. Mr. Johnson specifically reported that the Claimant could only work as an unarmed lobby ambassador. An outside security guard position is not the same as that of lobby ambassador. Thus, the Claimant's alleged rejection of that position was appropriate.

The Employer also questions the sincerity of the Claimant's job search efforts since he did not to fill out an application the first time he went to UPS and only filled out an application the second time because he was instructed to do so by his counsel. The Claimant testified that on his first visit to UPS, he was handed an application which said at the top that the applicant had to be able to "climb, carry 50 pounds, run, and protect from fights." (HT, 41.) He left because he could not do that type of physical activity. The document in question is entitled "Conditions of Employment" and states that as a prerequisite of employment with UPS, the applicant must be willing to accept the listed conditions. Included in the listed "conditions" was that the applicant had to be "capable of performing the essential functions of the job (with or without reasonable accommodation), including, but not limited to: standing or walking for an entire shift, climbing stairs or ladders, lifting or carrying up to 50 lbs, running, and self-defense." (CX 15.) Though Mr. Guzman and Mr. Jones testified that they have employed individuals with physical limitations and reported a couple of their accommodation efforts, the "Conditions of Employment" handout effectively screens the less-

[3] Mr. Johnson apparently used information from the research he did for Mr. Vasquez's labor market survey, or some other claimant's survey, in the report he did for the Claimant since the first 5 "lobby ambassador" positions listed in the labor market survey he did for the Claimant pre-date Mr. Johnson's interview with the Claimant.

sophisticated job applicant, like the Claimant, who will look at the physical requirements and decide that an application would be an exercise in futility. In fact, UPS applicants are not even asked to provide information about their physical limitations or health problems until after they've been hired. (HT, p. 256, EX 26.) With the wording of the Conditions of Employment and the Claimant's limited understanding of English, I find the Claimant had a good faith belief that his physical limitations made him ineligible for consideration for employment with UPS.

Request for Section 8(f) Relief Denied

The Employer argues that they are entitled to Section 8(f) relief. The Employer filed a petition for Section 8(f) relief on May 28, 2002, just before this proceeding was initiated. In support of the petition, the Employer submitted a copy of a March 19, 2001, MRI report concerning the Claimant's right shoulder which stated that the Complainant had a degenerative erosion of the humeral head of the right shoulder. (EX 14, p. 166-175.)

To obtain relief under Section 8(f) relief, an employer must make a three-part showing that (1) the employee had a pre-existing permanent partial disability; (2) the partial disability was manifest to the employer before the last injury; and (3) the partial disability rendered the second injury more serious than it otherwise would have been. *See, e.g. Director, Office of Workers' Compensation Programs v. Berkstresser*, 921 F 2d. 306, 309 (9th Cir. 1990); *Director, Office of Workers' Compensation Programs v. Potomac Electric Power Co.*, 607 F.2d 1378, 1382 (D.C. Cir. 1979).

A "pre-existing disability" means "such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment related accident and compensation liability." *C & P Telephone v. Director, Office of Workers' Compensation Programs*, 564 F.2d 503, 513 (D.C. Cir. 1977). In this instance, the Employer satisfied the first part of the test because the MRI report establishes that the Claimant had a degenerative condition in his right shoulder that undoubtedly existed before his injury that is the subject of this claim.

The employer, however, must still satisfy the "manifestation" test. The manifestation requirement is not a statutory requirement under Section 8(f), although it has been contained in the regulations since 1985. *See* 20 C.F.R. § 702.321(a). The requirement itself was created by the courts and has been regularly imposed by the Benefits Review Board and all of the circuit courts with the exception of the Sixth Circuit. *See American Mutual Shipbuilding Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970); *American Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 865 F.2d 727 (6th Cir. 1989); *Caudill v. Sea-Tac Alaska Shipbuilding*, 22 BRBS 92 (1991). If the employer has actual knowledge of a claimant's pre-existing disability, the manifest requirement is obviously satisfied.

In this case, there is no evidence that the Employer had actual knowledge of the pre-existing condition before the MRI report was prepared. If an employer does not have actual knowledge of the pre-existing disability, constructive knowledge will satisfy the requirement as well. Constructive knowledge may be proved from medical records in existence at the time of the subsequent injury from

which the condition was objectively determinable. *See Director, Office of Workers' Compensation Programs v. Universal Terminal & Stevedoring Co. (De Nichilo)*, 575 F.2d 452, 457 (3d Cir. 1978). The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest, so long as there is sufficient information that might motivate a cautious employer to consider terminating the employee because of the risk of compensation liability. *See Director, Office of Workers' Compensation Programs v. Berkstresser*, 921 F.2d at 307 ("[T]he proper touchstone for the manifest requirement is not whether the underlying disabling condition 'actually impairs the employee' but whether the condition puts the employer on notice of greatly increased liability and thus creates a risk of discrimination.")

In this case, there is also no evidence that the Employer had constructive knowledge of the Claimant's pre-existing injury. The only medical record referring to the Claimant's degenerative condition is in the MRI report made after his injury. There are no records in evidence prior to the second injury that refer to the Claimant's pre-existing condition.

Thus, I find the Employer has failed to show that the Claimant's pre-existing condition was "manifest" to the employer, and the request for Section 8(f) relief is DENIED.

Attorney Fees and Costs

Under Section 28 of the Act, a claimant may recover reasonable and necessary attorney's fees and costs associated with the "successful prosecution" of his claim. 33 U.S.C. § 928. The Claimant is entitled to reasonable attorney's fees and costs for the work done on the issues that Claimant has prevailed upon.

CONCLUSIONS

The Claimant suffered a work-related injury to his right shoulder on December 12, 2000, while working at San Pedro Boat Works. His injury is covered by the Act. The Claimant's physical limitations prevent him from returning to his former position as a marine machinist. The light duty position that the Claimant started on February 6, 2002, was a sheltered employment situation because the Claimant's assigned job was not necessary or profitable for the Employer. The Employer has failed to identify specific suitable alternate employment for the Claimant. The Claimant is entitled to permanent total disability benefits commencing February 6, 2002.

ORDER

Based on the findings and conclusions set forth above, is hereby ORDERED that:

1. San Pedro Boat Works and Frank Gates Acclaim shall pay Krsto Jelenic compensation for total permanent disability benefits based on his stipulated average weekly wage of $1,018.13 beginning February 6, 2002;

2. San Pedro Boat Works and Frank Gates Acclaim shall receive credit for the wages paid to the Claimant between February 6, 2002, and October 15, 2002, while he was on light duty;

3. San Pedro Boat Works and Frank Gates Acclaim shall receive credit for the permanent partial disability benefits that have been paid to the Claimant;

4. San Pedro Boat Works and Frank Gates Acclaim shall pay Krsto Jelenic the additional monies owed to him in total disability benefits for the period from May 1, 2001, to February 9, 2002, resulting from the stipulated higher average weekly wage;

5. San Pedro Boat Works and Frank Gates Acclaim shall pay interest on all due but unpaid compensation from the date the compensation became due until the date of actual payment at the rate specified in 28 U.S.C. § 1961;

6. The District Director shall make all calculations and periodic adjustments necessary to implement this order;

7. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the Respondent's Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for employer shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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JENNIFER GEE
Administrative Law Judge